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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1928.**

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**No. 22.**

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**POSTUM CEREAL COMPANY, INC., APPELLANT,**

**vs.**

**CALIFORNIA FIG-NUT COMPANY, APPELLEE.**

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**ON APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF  
COLUMBIA.**

---

**BRIEF OF APPELLANT.**

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**EDWARD S. ROGERS,  
ALLEN M. REED,  
JOHN S. PRESCOTT,**  
*Attorneys for Petitioner.*

**WM. J. HUGHES,**  
*Of Counsel.*



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This is an appeal from a decision of the Court of Appeals of the District of Columbia dismissing for want of jurisdiction an appeal from a decision of the Commissioner of Patents in a trade-mark case arising under the Act of Congress of March 19, 1920.

### **Opinion of the Court of Appeals.**

The opinion of the Court of Appeals is reported in 297 Fed., 544. It also appears in the record at page 79.

### **Jurisdiction of this Court.**

The judgment of the Court of Appeals was entered on April 7, 1924 (R., 79). An appeal was allowed to this Court on July 1, 1924 (R., 80), under section 250 of the Judicial Code (since repealed by the Act of February 13, 1925 (43 Stat., 936, 941)).

### **The Question Involved.**

The sole question is whether the Court of Appeals, under the Trade-Mark Act of March 19, 1920 (41 Stat., 533), has jurisdiction to review a decision of the Commissioner of Patents.

### **The Facts.**

This proceeding was instituted by a petition in the United States Patent Office under the Trade-Mark Act of March 19, 1920 (41 Stat., 533), to cancel the registration of the word "Fig-Nuts" as a trade mark for a breakfast cereal. The petition averred that the name "Fig-Nuts" infringes appellant's well-known and valuable trade-mark "Grape-Nuts," long previously owned, in use and registered by appellant as a trade-mark for merchandise indistinguishable in appearance. The circumstances of the adoption of the

name "Fig-Nuts" indicate a thinly disguised purpose to benefit by the wide sale and extensive advertising of "Grape-Nuts," in the unnecessary resemblance between the two marks and in the application of the words "Fig-Nuts" to a breakfast cereal composed essentially of flour and bran.

Answer was filed and testimony taken. The petition was dismissed by the Commissioner of Patents and a petition for rehearing denied. From the decision of the Commissioner an appeal was taken to the Court of Appeals. As only a question of law is involved, no discussion of the facts will be attempted.

### **The Decision Below.**

The appeal to the Court of Appeals was dismissed, the court holding that it had no jurisdiction to entertain an appeal from the Commissioner of Patents in a trade-mark case arising under the Trade-Mark Act of March 19, 1920 (R., 79).

The Court of Appeals followed its decision in *United States Compression Inner Tube Co. v. Climax Rubber Co.* (53 App. D. C., 370; 290 Fed., 345). In that case it held that as the enumeration in section 6 of the Act of 1920 of various sections of the Trade-Mark Act of 1905, "made applicable to marks placed on the register provided for by section 1 of this act," omitted section 9 of the Act of 1905, and as section 9 related to appeals from the Commissioner of Patents to the Court of Appeals, no right of appeal is now given by this statute; in other words, that the right to an appeal was repealed by implication.

### The Issue.

It is plain from the above that there is no question before this Court as to the correctness of the decision of the Commissioner of Patents, or whether that decision was ministerial or judicial. Prior to the Act of 1920 his decision, whichever it was, was reviewable by the Court of Appeals of the District of Columbia under section 9 of the Trade-Mark Act of February 20, 1905. Congress in that act specifically gave a right of review, and that right has been frequently exercised. The only question here is whether the jurisdiction thus conferred has been taken away by implication by the Act of March 19, 1920, as to cases arising under that act.

The question is a serious one, not only in this case but generally, for if the right of judicial review conferred and exercised by the Court of Appeals under the Act of 1905 has been taken away by the Act of 1920, there is now no review, *in any court*, of the decisions of the Commissioner of Patents in any trade-mark case under the Act of 1920 originating in the Patent Office.

The result of the decision below is that parties to such proceedings have no means of obtaining any judicial determination of the important questions of law and fact which are constantly arising in these cases which involve valuable trade-mark rights both in the United States and in foreign countries.

It has been the settled policy of the patent and trade-



mark laws to provide a means to review cases originating in the Patent Office, so that the terms of the statutes, often obscure, can be interpreted and clarified, and not to compel litigants to submit to administrative Government officers the final determination of important legal rights.

### **The Statutes Involved.**

The statutes involved are section 1 (*b*) and section 6 of the Trade-Mark Act of March 19, 1920 (41 Stat., 533), which are as follows:

“Sec. 1 (*b*). \* \* \* That trade-marks which are identical with a known trade-mark owned and used in interstate and foreign commerce, or commerce with the Indian tribes, by another and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers, shall not be placed on this register.

“Sec. 6. That the provisions of sections 15, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27 and 28 (as to class (*b*) marks only) of the Act approved February 20, 1905, entitled ‘An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States, or with the Indian tribes, and to protect the same,’ as amended to date, and the provisions of section 2 of the Act entitled ‘An Act to amend the laws of the United States relating to the registration of trade-marks,’ approved May 4, 1906, are hereby made applicable to marks placed on the register provided for by section 1 of this Act; \* \* \*

And section 9 of the Act of February 20, 1905 (33 Stat., 727), which reads:

“That if an applicant for registration of a trade-mark, or a party to an interference as to a trade-mark, or a party who has filed opposition to the registration of a trade-mark, or party to an application for the cancellation of the registration of a trade-mark is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the Court of Appeals of the District of Columbia, on complying with the conditions required in case of an appeal from the decision of the Commissioner by an applicant for patent, or a party to an interference as to an invention, and the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable.”

### **Synopsis of Argument.**

I. The decree of the Court of Appeals dismissing the appeal for want of jurisdiction is a final decree, capable of review by this Court.

II. The jurisdiction of the Court of Appeals under the Act of 1905 was not divested by the Act of 1920 by implication.

III. The reasoning of the Court of Appeals would compel the conclusion that practically the whole Trade-Mark Act of 1905 was repealed by the Act of 1920, and would result in a complete breakdown of the existing trade-mark practice.

IV. The decree of the Court of Appeals would deny to registrants of trade-marks any relief from erroneous decisions of the Patent Office.

## ARGUMENT.

### I.

**The Decree of the Court of Appeals Dismissing the Appeal for Want of Jurisdiction is a Final Decree Capable of Review by this Court on Appeal.**

The duty to this Court of counsel for appellant requires them in candor to say that they have been of the opinion that certiorari was the proper means by which the question of jurisdiction herein involved could be determined, and that because a contrary view had been urged, namely, that this Court had jurisdiction under section 250 of the Judicial Code, an appeal was taken. The petition for a writ of certiorari submitted herein was denied, however, by this Court on October 20, 1924.

But as this Court in its decision in the case of *The Baldwin Company v. Robertson*, 265 U. S., 168 (a case similar in many respects to the one at bar), denied a petition for certiorari therein submitted, and held that an appeal would lie from a decision of the Court of Appeals in a trade-mark cancellation proceeding, counsel feel that their duty to their client requires them to press the present appeal. Should the court be of opinion that the case is not properly before it on appeal, in view of the importance of the question involved, as will hereinafter appear, and the fact that this Court alone can determine it, counsel respectfully submit that the Court should rescind its order denying

the petition for a writ of certiorari, allow the writ and review the decision below.

In the case of *Security Trust Co. v. Dent*, 187 U. S., 237, this Court said (239):

“The cause was then brought here by a writ of error. We think the proper course was to have asked for a writ of certiorari to bring the final judgment of the Circuit Court of Appeals here for review. However, under the powers possessed by us under the judiciary act of March 3, 1891, we now allow a writ of certiorari, and direct that the copy of the record heretofore filed under the writ of error shall be taken and deemed as a sufficient return to the certiorari.”

In this connection it is to be noted that the Court on October 26, 1925, granted a writ of certiorari in the case of *Federal Trade Commission, Petitioner, v. Alfred Klesner, etc.*, No. 211, October term, 1926, on the application of the Government. That case, like this, presents a question of the jurisdiction of the Court of Appeals.

Section 250 of the Judicial Code, in effect on the date of the decision appealed from in the present case, provided as follows:

“Any final judgment or decree of the Court of Appeals of the District of Columbia may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal in the following cases:

\* \* \* \* \*

“Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.”

As the decree of the Court of Appeals dismissed the appeal for want of jurisdiction (R., 79), it necessarily is a final decree. This Court so held in the case of *The Baldwin Company v. Robertson*, *supra*, citing *Shaffer v. Carter*, 252 U. S., 37, 44. The decrees of the Court of Appeals of the District of Columbia, which are *not* final, are the rulings which are *advisory* on the Patent Office. *This is not that kind of case.* When the Court construes a statute and holds that it has no jurisdiction thereunder to entertain an appeal and consider a case, such a decision is necessarily a final one. When the litigation is terminated and nothing remains to be done but to carry what has been decreed into execution, such a decree has always been held to be final for the purposes of an appeal. *Winthrop Iron Co. v. Mecker*, 109 U. S., 180, 183. A judgment is final for purposes of a writ of error to this Court, which terminates the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered. *Mower v. Fletcher*, 114 U. S., 127; *Lodge v. Twell*, 135 U. S., 232.

In *Kingman & Co. v. Western Manufacturing Co.*, 170 U. S., 675; *Wetmore v. Rymer*, 169 U. S., 115; *Huntington v. Laidley*, 176 U. S., 668, 677, this Court held that the decision of a court dismissing a bill for want of statutory authority to entertain it, or other-

wise divesting itself of jurisdiction, is final and reviewable by this Court.

The decision of the Court of Appeals was based upon its construction of the Trade-Mark Act of March 19, 1920 (41 Stat., 533), made in *United States Compression Inner Tube Co. v. Climax Rubber Co.*, 53 App. D. C., 370; 290 Fed., 345. In that case it held that as section 6 of the Trade-Mark Act of 1920, in carrying over into that act certain sections of the Trade-Mark Act of February 20, 1905 (33 Stat., 727), omitted section 9, and as section 9 authorized appeals from the Commissioner of Patents to the Court of Appeals, there now exists no right of appeal in proceedings brought under the latter act. The construction of this law of the United States was necessarily brought in question by or on behalf of the defendant. It would seem, therefore, as in *The Baldwin Co. v. Robertson*, *supra*, that an appeal will lie from the Court of Appeals of the District of Columbia to this Court.

The only final judgments and decrees of the Court of Appeals of the District of Columbia *which may not be reviewed* on appeal or writ of error are those "arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases." While the trade-mark laws are administered by the Commissioner of Patents, they are not "patent laws," and therefore the judgment complained of does not fall within the exceptions of section 250. No other conclusion can be reached, in view of the fact that this Court entertained the appeal in *The Baldwin Co. v. Robertson*, *supra*, which also presented for decision the

application of section 9 of the Trade-Mark Act of 1905. A trade-mark registration does not involve the validity of any patent or copyright. *South Carolina v. Seymour*, 153 U. S., 353, 358. The Act of January 28, 1915 (38 Stat., 804), amending section 128 of the Judicial Code, which provided, among other things, the classes of cases which should be final in the Circuit Court of Appeals by adding thereto cases "under the trade-mark laws," applied only to that court and did not affect cases in the Court of Appeals of the District of Columbia. On the other hand, this Court has reviewed trade-mark cases on certiorari under section 128 of the code now amended by the Act of February 13, 1925 (43 Stat., 936). See *Hutchinson, Pierce Co. v. Lowry*, 217 U. S., 457; *Street & Smith v. Atlas Mfg. Co.*, 231 U. S., 348.

## II.

### **The Jurisdiction of the Court of Appeals under the Act of 1905 was not Divested by Implication by the Act of 1920.**

To justify the decision of the Court of Appeals, it must appear that Section 9 of the Act of 1905 was *repealed* by Congress. This section is printed in the margin\* with the relevant matter in italics. Appel-

\* Sec. 9. *That if an applicant for registration of a trade-mark or a party to an interference as to a trade-mark, or a party who has filed opposition to the registration of a trade-mark, or party to an application for the cancellation of the registration of a trade-mark, is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the Court of Appeals of the District of Columbia, on complying with the conditions required in case of an appeal from the decision of the Commissioner by an applicant for patent, or a party to an interference as to an invention, and the same rules of practice and procedure shall govern in every stage of such proceedings as far as the same may be applicable.*

lant comes within the letter of this provision. It is a party to a cancellation, dissatisfied with the decision of the Commissioner of Patents, and is therefore entitled to a review by the Court of Appeals unless this section has been repealed expressly or by implication. It has not been expressly repealed. Whether it was impliedly repealed requires a construction of the two Trade-Mark Acts of 1905 and 1920. The latter act, counsel submit, was a *supplementary* and not a *super-seding* statute. It was designed for the purpose of giving effect to the Argentine Conference of August 20, 1910 (see preamble to 1920 Act), and not for the purpose of taking away any rights or remedies which American trade-mark registrants then had under the Act of 1905. An act which is intended to enlarge a right, or, as in the present case, to give right of registration to certain trade-marks not registrable under previously enacted statutes, cannot, it is submitted, reasonably be held restrictive.

This Court views with disfavor repeals of statutes by *implication* (*Craig v. Hecht*, 263 U. S., 255). As was held in *U. S. v. Levois*, 17 How., 85, repeals of statutes by implication are not favored, and are never admitted where the earlier can stand with the new act, but only where there is a positive repugnancy between the statutes, or the later is plainly intended as a substitute for the earlier. It is submitted that there is no such repugnancy between the acts of 1905 and 1920.

In construing statutes *in pari materia* of different dates, the later repeals the earlier only when there are express terms of repeal, or where the implication of



repeal is a necessary one. *Wilmot v. Mudge*, 103 U. S., 217. There is no such necessity for the repeal of section 9 of the Trade-Mark Act of 1905. This Court has held that where two statutes cover in whole or in part the same subject-matter, and are not wholly irreconcilable, no purpose to repeal being clearly expressed or indicated, effect is to be given to both. *U. S. v. Healey*, 160 U. S., 136, and *U. S. v. Greathouse*, 166 U. S., 601. Likewise it is necessary to a repeal by implication by a statute covering the whole subject-matter of a former one that the objects of the two statutes be the same. *U. S. v. Claflin*, 97 U. S., 546. Here the object of the Trade-Mark Act of 1920 was *not* to repeal the Act of 1905, *but to give effect* to the International Conference of August 20, 1910 (see preamble to 1920 Act).

Furthermore, this Court has held that a statute will not repeal a prior statute merely because it repeals some of its provisions and admits others, or adds new provisions; the later act operates as a repeal only when it plainly appears that it was intended as a substitute for the earlier act. *C. M. & St. P. R. Co. v. U. S.*, 127 U. S., 406, 408. Counsel respectfully submit that the Trade-Mark Act of 1920 is not a substitute for the Act of 1905, but that the later act merely supplements the earlier one. Both are now in practical operation in the Patent Office.

## III.

**The Reasoning of the Court of Appeals Would Compel the Conclusion that Practically the Whole Trade-Mark Act of 1905 was Repealed by the Act of 1920, and Would Result in a Complete Breakdown of the Existing Trade-Mark Practice.**

The Act of March 19, 1920, contains no general repeal section, such as section 30 of the Act of February 20, 1905. If it is held that section 9 of the Act of 1905 has been repealed because it was not enumerated among the sections carried over into the Act of 1920 by section 6 thereof, it must necessarily be held that sections 1, 2, 3, 4, 5, 6, 7, 8, 10, part of 11, 12, 24 and 29 of the Act of 1905 have also been repealed by implication for the reason that, as will be demonstrated herein, they have not been expressly re-enacted or carried over into the Act of 1920.

Such a decision would mean that *no trade-marks may now* be registered under the Act of 1905. It would mean that there is no longer on our statute books any law relating to trade-mark practice in the Patent Office, since sections 1, 2, 3 and 4 of the Act of 1905 are the only statutory provisions relating to the requirements of applications for the registration of trade-marks. Sections 6, 7 and 8 of the Act of 1905 are the only statutes providing for the examination in the Patent Office of applications for the registration of trade-marks and for interference, opposition and cancellation proceedings therein.

If the doctrine of repeal by implication is applied

to the Trade-Mark Acts of 1905 and 1920, then section 10 of the Act of 1905 is no longer the law of the land and there is no authority for the recording of assignments of trade-marks, and if paragraph 1 of section 11 and section 12 have been repealed there is no authority for the issuance of certificates of registration. If the decision in this case is sustained, all rights secured by registration of trade-marks in the Patent Office will be destroyed, and those registered since the enactment of the Act of 1920 will be rendered of doubtful validity.

An examination of the Trade-Mark Act of 1920 will indicate that sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, par. 1, 12, 24 and 29 of the Act of 1905 have not been expressly carried over into it, and that the later act is in reality a supplementary statute.

Thus, section 1 of the Act of 1920 relates to the keeping of a register of (*a*) trade-marks communicated to the Commissioner of Patents by the international bureaus provided for by the Argentine Conference of August 20, 1910, and (*b*), with certain exceptions, trade-marks *not* registrable under the Act of February 20, 1905. As nothing is said respecting trade-marks *registrable* under the Act of 1905, it is obvious that Congress intended that they might still be registered and they actually are being registered. But if section 9 is held to have been repealed by implication, then those sections of the act designating what marks *are* registrable must also be held to have been repealed by implication.

Section 2 of the Act of 1920 is identical with section 13 of the Act of 1905.

Section 3 of the Act of 1920 relates to suits against persons using a false designation of origin of merchandise placed in foreign and interstate commerce.

Section 4 of the Act of 1920 is identical with section 16 of the Act of 1905.

Section 5 of the Act of 1920 provides for the publication of notice of registration by registrants of class (*a*), section 1 marks.

Section 6 provides for the application of certain provisions of the Act of 1905 to marks placed on the register by section 1 of the act. These provisions are sections 15, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27 and 28 (as to class (*b*) marks only) of the Act of 1905.

Section 7 is identical with section 11, paragraph 2, of the Act of 1905.

Section 8 is identical with section 14, of the Act of 1905.

Section 9 provides for an amendment to section 5 of the Act of 1905. It is apparent that although that section of the Act of 1905 was not among those enumerated in section 6 of the later act, Congress did not intend to repeal it. It is not unreasonable, therefore, to assume also that Congress did not intend to repeal the other non-enumerated sections of the Act of 1905.

The latest edition of the rules of the Patent Office concerning the registration of trade-marks is that of November 1, 1925, copies of which are submitted herewith for the convenience of the Court. An examination of these rules indicates that the Patent Office still considers that trade-marks may be registered under the Act of February 20, 1905 and that the act is in other respects in full force and effect. Section 1 of the Act

of 1905 is cited as the authority for rules 16, 17, 19, 21, 22 and 36. Section 2 of the Act of 1905 is cited as the authority for rules 17, 31, 33 and 34. Section 3 of the Act of 1905 is the authority for rules 28 and 29. Section 4 of the Act of 1905 is given as the authority for rules 17, 27 and 73. Section 5 of the Act of 1905 is the authority for rules 19, 20 and 32. Section 6 is cited as the basis for rules 38, 40 and 56. Section 9 is the authority for rule 64. Section 10, for rules 76 and 77. Section 11, for rules 69, 78 and 79; and section 12 of the Act of 1905, for rules 70, 71 and 72.

It must therefore be concluded that Congress did not intend to repeal those sections of the Act of 1905. Is there any more reason to suppose that Congress intended to repeal section 9?

#### IV.

### **The Decree of the Court of Appeals Denies to Owners of Trade-Marks in Proceedings Involving Their Registration Any Relief from Erroneous Decisions of the Patent Office.**

Much confusion exists at the bar today as to the scope and effect of the Act of March 19, 1920.

Should the construction of the Court of Appeals in this case be upheld, owners of trade-marks availing themselves of the Act of 1920, which was designed to foster foreign commerce, will have no relief from erroneous decisions of the Patent Office. This Court held, in *Baldwin Company v. Robertson*, *supra*, that a dissatisfied party to an application for the cancellation of the registration of a trade-mark is given a

remedy by bill in equity as provided for a defeated applicant for a patent in R. S. 4915. That right, however, will also be denied to the dissatisfied party to a cancellation proceeding if the decision in the present case is sustained, because if section 9 of the Act of 1905 providing for appeals is not applicable to cases arising under the Act of 1920, then there can be no proceeding under R. S. 4915, for the reason that it was section 9 of the Trade-Mark Act of 1905 which this Court held was the basis for the proceeding under section 4915 of the Revised Statutes. (*American Steel Foundries v. Robertson*, 262 U. S., 209; *Baldwin Co. v. Robertson*, *supra*.)

It must be apparent that the question presented is whether Congress intended that valuable and important trade-marks can be pirated with impunity under the forms of law, and the injured party denied access to any court. Yet this is the consequence of the decree below.

A colorable imitation of appellant's valuable trade-mark applied to indistinguishable merchandise was registered by the Patent Office upon an affidavit by appellee that it believed itself to be the owner, and that no other person, firm, corporation or association, to the best of its knowledge and belief, had the right to use this mark, and that it was in *bona fide* use not less than a year. An obvious simulation of appellant's trade-mark was thereupon allowed registration by the Patent Office. Appellant's petition to cancel this registration was denied, and the Court of Appeals now holds that there is no appeal and hence no way in which this ruling can be rectified, with the result that a

piratical trade-mark, under the apparent sanction and protection of the law, remains, in perpetuity,\* upon the records of the Patent Office.

### Conclusion.

For the reasons stated, it is submitted that the decision of the Court of Appeals of the District of Columbia should be reversed and the case remanded to that Court for further proceedings.

EDWARD S. ROGERS,  
ALLEN M. REED,  
JOHN S. PRESCOTT,  
*Attorneys for Petitioner.*

WM. J. HUGHES,  
*Of Counsel.*

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\* There is no time limit set to registrations under the Act of 1920.